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No. 94-1605

In the Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD M. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 545, which establishes felony penalties for the knowing or fraudulent importation into the United States of merchandise "contrary to law," applies to violations of federal regulations having the force and effect of law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 39 F.3d 465.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1994. A petition for rehearing was denied on December 30, 1994. Pet. App. 36a-37a. The petition for a writ of certiorari was filed on March 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of violating 18 U.S.C. 545, which establishes felony penalties for the fraudulent or knowing importation of merchandise into the United States "contrary to law." He was sentenced to two years' probation and was fined $1,000. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was employed by the Fish and Wildlife Service (FWS) of the United States Department of the Interior. His job responsibilities included providing advice on the legal requirements for import and export of wildlife, and reviewing applications for wildlife import and export permits. Outside his employment with FWS, petitioner booked and promoted sport-hunting programs overseas. Don Cox, an acquaintance of petitioner's, travelled to the Punjab province of Pakistan, where he hunted and killed two Punjab urials and a Chinkara gazelle, in violation of Pakistani law. Unable to obtain permits to export the hides and horns from Pakistan, Cox arranged for petitioner to smuggle the trophies out of Pakistan and into the United States. On September 25, 1987, petitioner arrived at Dulles International Airport carrying the contraband hides and horns. Petitioner did not declare the hides and horns, nor did he disclose that he was carrying untanned animal hides into the United States. Petitioner also failed to complete an FWS Declaration for Importation or Exportation of Fish and Wildlife Form. Pet. App. 2a.

2. In June 1992 a grand jury returned a nine-count indictment against petitioner. Count Nine (see C.A. App. 28) charged that petitioner's importation of the

hides and horns was in violation of 18 U.S.C. 545, which provides that "[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law * * * [s]hall be fined not more than $10,000 or imprisoned not more than five years, or both." C.A. App. 28. The importation was alleged to have been "contrary to law" in three respects. First, petitioner's failure to declare the hides and horns on his Customs Service Declaration Form 6059-B violated 19 C.F.R. 148.11 *et seq.* (the Customs regulation). Second, his failure to complete an FWS Declaration for Importation or Exportation of Fish or Wildlife Form 3-177 violated 50 C.F.R. 14.61 *et seq.* (the FWS regulation). Finally, his failure to show the country of origin of the hides and horns on a commercial invoice or in some other manner satisfactory to the Deputy Administrator of Veterinary Services of the Department of Agriculture violated 9 C.F.R. 95.1 *et seq.* (the Agriculture regulation). See C.A. App. 28.

Petitioner twice moved to dismiss the Section 545 charge. In his first motion, he acknowledged that an allegation that he had "violated some independent law *or regulation*" would be sufficient to sustain the indictment. C.A. App. 33 (emphasis added). Petitioner argued that the indictment was insufficient because it failed to allege the manner in which his conduct violated the cited regulations and because two of the regulations were inapplicable to his conduct. *Ibid.* That motion was denied. *Id.* at 59.

Several months later, petitioner filed a second motion to dismiss the Section 545 charge, this time arguing that federal regulations are not "law" within the meaning of Section 545 and that importing merchandise contrary to regulations therefore was not

"contrary to law." C.A. App. 63-67. Petitioner also contended that a felony conviction under Section 545 could not be predicated on a violation of the FWS regulation because Congress had provided a misdemeanor penalty for violation of that regulation. C.A. App. 67-70. The district court denied the motion. *Id.* at 111.

Seven of the nine counts of the indictment were dismissed by the district court. C.A. App. 149. The jury acquitted petitioner of one count (a conflict-of-interest charge) and convicted him of knowingly importing merchandise contrary to law, in violation of Section 545. See C.A. App. 21, 149.

3. The court of appeals affirmed. Pet. App. 1a-27a. Relying in substantial part on *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979), the court held that "the plain meaning of 'law' includes regulations having the force and effect of law." Pet. App. 5a. Finding no evidence in the legislative history that Congress intended to limit Section 545 to statutory violations, the court held that the word "law," within the meaning of Section 545, includes regulations having the force and effect of law. Pet. App. 6a-7a. Because the court found the statute to be unambiguous, it rejected petitioner's contention that the rule of lenity required reversal of his conviction. *Id.* at 7a-8a. Finally, the court rejected petitioner's argument that because Congress had specifically established misdemeanor penalties for violations of the FWS and Agriculture regulations, importation of merchandise contrary to those regulations could not serve as a basis for felony penalties under Section 545. The court noted that "no inherent difficulty exists in Congress' criminalizing the same conduct under two different statutes, one of which provides for

misdemeanor and the other felony punishment." Pet. App. 11a-12a. The court found no evidence that the pertinent FWS and Agriculture statutes were intended to repeal by implication Section 545 as it applied to petitioner's conduct, *id.* at 12a-14a; it concluded as well that "[t]he purposes of § 545 and the [pertinent] regulations * * * are not contradictory and, in fact, are complementary." *Id.* at 20a.

Judge Murnaghan dissented. Pet. App. 22a-27a. He concluded that with respect to the status of federal regulations as "law," "Section 545 is unarguably ambiguous," *id.* at 26a, and that the rule of lenity required reversal of petitioner's conviction. *Id.* at 26a-27a.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals' holding that the word "law," within the meaning of 18 U.S.C. 545, includes federal regulations having the force and effect of law perpetuates confusion on this issue in the lower courts. That contention lacks merit, and further review is not warranted.

1. The only prior case squarely to address the question whether Section 545 (or its predecessor) applies to the importation of merchandise contrary to federal regulations is *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915). In that case, defendant Estes imported cattle from Mexico without complying with certain regulations established by the Secretary of Agriculture. He was convicted of importing the cattle "contrary to law" in violation of Revised Statutes § 3082 (1878), the predecessor to Section 545. On appeal, Estes argued that the regulation was not a

"law." The court of appeals affirmed the conviction, holding that

> as these regulations were fully authorized by law, and their violation made punishable by law * * *, it must be held, we think, that it was proper to allege in the indictment that the cattle in question had theretofore been imported and brought into the United States from the republic of Mexico contrary to law, as specified in the indictment, so as to bring the charge within the language of section 3082.

227 F. at 821-822.[1]

Petitioner contends that "[a] number of other cases support the conclusion that 'contrary to law' does not reach conduct that violates no statutory provisions." Pet. 7. That contention is unfounded. None of the cases cited by petitioner (see Pet. 7-8) addresses the question whether administrative regulations constitute "law" within the meaning of Section 545. Rather, those decisions contain references to statutory violations simply because the defendants in those cases were charged with importing merchandise in violation of federal statutes. See *Keck* v. *United*

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[1] See also *United States* v. *Ivey*, 949 F.2d 759, 762 (5th Cir. 1991) (court upheld defendants' Section 545 convictions for importing merchandise "contrary to 16 U.S.C. § 1538(c)(1) and 50 C.F.R. § 23.11(b)(1)," though without discussing question whether regulation constituted "law"), cert. denied, 113 S. Ct. 64 (1992); *United States* v. *Murphree*, 783 F.2d 605, 609 (6th Cir.) (administrative regulation will "define for the courts * * * what is contrary to law under 18 U.S.C. § 545" if it is "a 'substantive rule' or a 'legislative-type rule' as described by the Supreme Court in" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-303 (1979)), cert. denied, 479 U.S. 839 (1986).

States, 172 U.S. 434, 437 (1899) (indictment charged that importation was contrary to unspecified "act of congress"); *Goldberg* v. *United States*, 277 F. 211, 214 (8th Cir. 1921) (underlying violation was importation of whisky in violation of federal statute); *Palmero* v. *United States*, 112 F.2d 922, 925 (1st Cir. 1940) (importation of narcotics in violation of federal statute); *United States* v. *Lee*, 937 F.2d 1388, 1396 (9th Cir. 1991) (importation of salmon contrary to Lacey Act, 16 U.S.C. 3371 *et seq.*), cert. denied, 502 U.S. 1076 (1992); *United States* v. *Menon*, 24 F.3d 550, 558 (3d Cir. 1994) (reimportation of adulterated food in violation of 21 U.S.C. 331); *United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal. 1960) (importation of amphetamines in violation of 19 U.S.C. 1461, 1484, and 1485). There is, therefore, no circuit conflict, or "confusion" (Pet. 9), among the lower courts regarding the question presented by the petition.

2. Petitioner relies primarily (see Pet. 5-6) on this Court's decision in *United States* v. *Eaton*, 144 U.S. 677 (1892), to support his contention that the law is unclear on when and whether administrative regulations constitute "law."

a. In *Eaton*, the defendant was prosecuted under a statute that provided penalties for the failure of an oleomargarine manufacturer to take any action "required by law in the carrying on or conducting of his business." 144 U.S. at 685. The defendant had failed to perform a duty imposed by regulation. The question before the Court was whether the defendant's failure to comply with the regulation constituted a failure to do a thing "required by law." The Court held that compliance with the regulation was not "required by law," reasoning that although regulations "may * * * have * * * the force of

law," nevertheless "it does not follow that a thing required by [regulations] is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence." *Id.* at 688.

This Court has not cited *Eaton* since 1957, when it observed for the second time that "*United States* v. *Eaton* turned on its special facts." *United States* v. *Howard*, 352 U.S. 212, 216 (1957) (quoting *Singer* v. *United States*, 323 U.S. 338, 345 (1945)). The question in *Howard* was whether the Black Bass Act of May 1926, which provided criminal penalties for the transportation of black bass "contrary to the law of the State" from which the fish was transported, applied to fish transported in violation of state regulations. The defendants, relying on *Eaton*, argued that regulations promulgated by the Florida Game and Fresh Water Fish Commission did not constitute "law" within the meaning of the Black Bass Act. The Court rejected that argument, noting that

> [*United States* v. *Eaton*] has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

352 U.S. at 216 (quoting *Singer*, 323 U.S. at 345). The Court held that the applicable Florida regulations constituted "law" within the meaning of the Black Bass Act, explaining that "it is beyond question that the Florida Legislature * * * intended to and did make infraction of any commission regulation a

violation of state law, punishable as a misdemeanor." 352 U.S. at 216-217.[2]

b. In *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979), this Court further elucidated the analytical framework for determining whether the word "law" in a federal statute includes administrative regulations. In that case, Chrysler argued that the government's disclosure of certain information, done in accordance with administrative regulations, was not "authorized by law" because the regulations were not "law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905. This Court explained that

> [i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to preempt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

441 U.S. at 295-296 (footnotes omitted). The Court examined the legislative history of the Trade Secrets Act, which was initially enacted in 1864, and found "nothing in the legislative history of § 1905 and its

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[2] The Court noted that it "need not decide now whether a state agency could make a rule of such a temporary nature and so unaccompanied by the procedural niceties of rule making that the declaration should not be considered the law of the State for purposes of a statute such as the Black Bass Act," because the defendant "ha[d] not demonstrated that the rule here involved is of such a character." 352 U.S. at 217.

predecessors which lends support to Chrysler's contention that Congress intended the phrase 'authorized by law,' as used in § 1905, to have a special, limited meaning." *Id.* at 298. The Court therefore interpreted the word "law" in Section 1905 to include regulations having the force and effect of law.[3]

Petitioner contends that the legislative history of Section 545 provides the requisite "clear showing" that "law" does not include regulations having the force and effect of law. First, he suggests (Pet. 7) that in light of this Court's 1892 decision in *Eaton*, Congress's reenactment of Revised Statutes § 3082 (1878) (Section 545's predecessor) in 1922 and 1930 indicates that Congress intended the phrase "contrary to law" to exclude regulations having the force and effect of law. That argument is without merit. *Eaton* did not involve Section 545 or its predecessor; rather, the Court construed a different statute governing the manufacture of oleomargarine. Although Congress is presumed to be aware of and to adopt judicial interpretations of a statute when it reenacts that statute without change, the presumption loses force as applied to judicial interpre-

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[3] The *Brown* Court concluded that the particular regulations at issue in that case did not have the force and effect of law because they were not sufficiently related to a delegation of quasi-legislative authority and they were not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. 441 U.S. at 301-316. Petitioner does not dispute, however, that the regulations involved in the present case have the force and effect of law, as the court of appeals correctly held. Pet. App. 8a-11a. Therefore, the only issue presented in this case is whether the word "law" in Section 545 encompasses regulations having the force and effect of law.

tations of unrelated statutes—particularly since (as this Court recognized in *Howard* and *Singer*) *Eaton* did not "state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions." *Howard*, 352 U.S. at 216 (quoting *Singer*, 323 U.S. at 345). As we have explained above, see pages 5-6, *supra*, the only previous judicial decision squarely addressing the applicability of Section 545 or its predecessor to regulatory violations is *Estes* v. *United States*, *supra*, which held that the phrase "contrary to law" in Revised Statutes § 3082 (1878) encompassed such violations. If Congress's reenactment of Revised Statutes § 3082 (1878) in 1922 and 1930 is to be construed as reflecting approval of an existing judicial construction, that construction is to be found in *Estes* rather than in *Eaton*.

Petitioner also cites numerous statutes containing the phrase "contrary to law or regulation," and he contends (Pet. 9-10) that Congress's failure to use that phrase in Section 545 reflects an intent that regulatory violations not be covered. The Court in *Brown* explained, however, that the word "law" is presumed to include regulations having the force and effect of law absent "a clear showing of contrary legislative intent." 441 U.S. at 296. If the mere absence of the word "regulation" could furnish the requisite "clear showing," the presumption articulated in *Brown* would be rendered meaningless.

3. Petitioner also argues that this Court should grant certiorari "to resolve the apparent conflict between application of the rule of lenity and the presumption against implied repeals in the interpretation of ambiguous criminal statutes." Pet. 13. That contention is without merit.

This case does not present any conflict between the rule of lenity and the presumption against implied repeals. Petitioner invoked the rule of lenity in support of his argument that the word "law" does not include regulations. The court of appeals, noting that the rule of lenity applies only when "'grievous ambiguity or uncertainty' remains even after we have looked to the language, structure, and legislative history of the statute," held that the principle did not apply because Section 545 is not ambiguous. Pet. App. 8a (citations omitted). The presumption against implied repeals, by contrast, arose in response to petitioner's argument that, assuming Section 545 does apply to regulations in general, it nevertheless does not apply to two of the particular regulations petitioner violated because Congress has elsewhere provided misdemeanor penalties for violations of those rules. The court of appeals, citing *United States* v. *Batchelder*, 442 U.S. 114, 122-126 (1979), held that there is no inherent conflict between two different statutes criminalizing the same conduct and providing different penalties for its commission. Pet. App. 11a-12a. The court then examined the statutory provisions and their legislative histories and concluded that "there is no reason to infer that Congress, simply by later providing for misdemeanor punishment for violations of the FWS and Agriculture regulations under 16 U.S.C.A. § 1540(b) and 21 U.S.C.A. § 122, intended to preclude prosecution for a felony under § 545." Pet. App. 14a.[4]

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[4] Indeed, the existence of criminal penalties for violations of the FWS and Agriculture regulations undermines rather than supports petitioner's position, since it reinforces the inference that those regulations constitute "law" within the meaning of

Petitioner faults the court of appeals for treating the application of the rule of lenity and the presumption against implied repeals as separate issues, insisting that the two principles are "part and parcel of the same inquiry into the meaning of Section 545." Pet. 12. In fact, the court of appeals' analysis of those issues was fully consistent with this Court's approach in *Batchelder*. In *Batchelder*, as here, the defendant's conduct violated two different statutes, and he was convicted under the statute providing the more severe penalties. The Court rejected his reliance on the rule of lenity: It explained that there was "no ambiguity to resolve" because the defendant's conduct "unquestionably violated" the statute under which he was convicted. 442 U.S. at 121. The fact that the second statute "provide[d] different penalties for essentially the same conduct," the Court asserted, was "no justification for taking liberties with unequivocal statutory language." *Id.* at 121-122. The Court then addressed the question of implied repeal, explaining that "it is not enough to show that the two

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Section 545. See *Howard*, 352 U.S. at 216-217 (Court's conclusion that state regulations are "law" within the meaning of the Black Bass Act is based in part on the fact that "the Florida Legislature * * * intended to and did make infraction of any commission regulation a violation of state law, punishable as a misdemeanor").

It should be noted that 16 U.S.C. 1540(b) and 21 U.S.C. 122 establish penalties for breach of a variety of FWS and Agriculture regulations. Congress's determination that such violations should generally be treated as misdemeanors is in no way inconsistent with its determination that a particular category of regulatory violations—those involving the unlawful importation of merchandise into the United States—should be subject to more severe penalties.

statutes produce differing results when applied to the same factual situation. Rather, the legislative intent to repeal must be manifest in the positive repugnancy between the provisions. In this case, however, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes." *Id.* at 122 (citations and internal quotation marks omitted). The same analysis is equally applicable here.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] There is also no basis for petitioner's contention (Pet. 10, 12) that a circuit conflict exists regarding the standard for determining whether one statute has impliedly repealed another. Both of the decisions on which petitioner relies—*United States* v. *Omirly*, 488 F.2d 353 (4th Cir. 1973), and *United States* v. *Mueller*, 178 F.2d 593 (5th Cir. 1949)—predate *Batchelder* and are in significant respects inconsistent with its analysis. See Pet. App. 17a n.11.